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No. 98-1403

IN THE

Supreme Court of the United States

JAMES ROWLAND, *et al.*,

Petitioners,

v.

LEE A. RAND,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

AMY E. MARGOLIN
Counsel of Record
HOWARD, RICE, NEMEROVSKI,
CANADY, FALK & RABKIN
A Professional Corporation
Attorneys for Respondent
Three Embarcadero Center
7th Floor
San Francisco, California 94111-4065
(415) 434-1600

152778

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether a *pro se* prisoner litigant is entitled to a brief, understandable explanation of the requirements for opposing a summary judgment motion and the consequences of failing to do so, under any number of established statutory, common law, and/or constitutional principles?

Whether, upon review of such a notice violation, a court of appeal must speculate as to whether the litigant subjectively understood the requirements and risks of summary judgment, or whether the court may presume that such a notice violation was prejudicial absent objective evidence to the contrary?

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Respondent's Appendix A — Letter From The Deputy Clerk Of The Ninth Circuit Dated February 18, 1999 Transmitting A Certified Copy Of The Decree Of The Court To The United States District Court, Eastern District Of California (Sacramento) 1a

Respondent respectfully requests that the Court deny the petition for certiorari seeking review of the Ninth Circuit's opinion in *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998) (*en banc*).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the statutes listed in the Petition for Writ of Certiorari, this matter involves the Due Process Clause of the Fifth and Fourteenth Amendments, and Rule 1 of the Federal Rules of Civil Procedure, providing as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

U.S. CONST. amend. V.

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

U.S. CONST. amend. XIV, § 1.

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

FED. R. CIV. P. 1.

STATEMENT OF THE CASE

From October 1988 to April 1989, Respondent Lee Rand was quarantined in a prison infirmary at the California Correctional Institution ("CCI") because of his HIV status.

ER 34-37.[1] He was awaiting transfer to a specialized medical facility, but it was a potentially indefinite wait: prison officials told him that the facility refused to accept him, and that it was not known when the transfer would happen. ER 50.[2]

Though his immune system was compromised, he was confined during those snowy winter months in a cell so cold that it fogged the breath, due to a broken infirmary heater. ER 35, 264, 281. Despite the harsh conditions, he was totally unclothed but for his underwear and, for the last three months of his quarantine, a bathrobe. ER 35, 262. He was not allowed to set foot outside of his cell other than to take a shower three times a week during those six months, and to make an occasional phone call. ER 35. While in quarantine, he also did not receive any diagnostic testing to ascertain the extent of his HIV infection (ER 36), despite that one of his doctors noted in his medical chart that "AIDS, may be developing syndrome" (ER 123), and despite that one of his treating prison doctors told him that 30 percent of all HIV-positive patients suffer fatal strokes within a year. ER 266. He was told that budget constraints precluded such measures. ER 36. Finally, he also was denied a spectrum of basic privileges afforded all other inmates, including personal hygiene articles, personal property, and telephone access. ER 35-37, 361-64.

In April 1989, Rand filed suit under 42 U.S.C. § 1983 against various officials of the California Department of Corrections, asserting constitutional challenges to the

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1. "ER" citations are references to Appellant's Excerpts of Record, filed by Respondent in the Ninth Circuit.

2. Petitioners' statement that the California Medical Facility, to which Rand was awaiting transfer, was the "primary" diagnostic and treatment facility for the California Department of Corrections" (Petition for Writ of Certiorari ("Petition") 3 n.1) is not based on any evidence in the record.

conditions of confinement that he endured during that six-month period (ER 1), and shortly thereafter he filed an amended complaint. ER 24.

At the time he filed suit, Rand moved for appointment of counsel (ER 19), and he renewed that request over a year later. ER 69. The requests were denied on April 12, 1991. ER 75.

Petitioners filed a Motion for Summary Judgment on February 26, 1993, seeking dismissal of all of Rand's claims. ER 112; CR 69.[3] The motion opened with two pages under the heading "Notice of Rules Relating To Summary Judgment," consisting largely of dense, legal discourse that did not expressly advise Rand that any failure to provide responsive evidence might result in outright dismissal of his claims without a trial, nor did it state that any factual assertions by the moving party would be accepted as true unless he submitted contradictory admissible evidence. ER 113-16.

On July 27, 1993, after Rand had filed an opposition to the summary judgment motion (CR 78), the Magistrate Judge determined that appointment of counsel may be appropriate. ER 387. Although he ordered Rand's case file forwarded to the Civil Rights Attorney Panel for the Eastern District (*id.*), the record does not reflect that counsel was ever appointed.

On November 10, 1994, after having already entered initial findings and recommendations that the summary judgment motion be denied in all but one respect (ER 389-99) that the district court largely did not adopt (ER 400), the Magistrate Judge issued further Findings and Recommendations recommending that the motion for summary judgment be

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3. "CR" references are to the Clerk's Record in the district court.

granted, and all of Rand's claims be dismissed. ER 404.[4] On January 17, 1995, the Findings and Recommendations were adopted in full by the district court (ER 428), and judgment was entered accordingly. ER 431.[5]

On appeal to the Ninth Circuit, Rand challenged the district court's orders granting summary judgment on numerous substantive grounds. He also contended that the district court had abused its discretion by declining to appoint him a lawyer. Finally, he argued that the district court had erred by failing to give him proper notice of his obligations in responding to the defendants' motion for summary judgment, as well as any explanation of what was at stake should he fail to respond properly (*i.e.*, loss of the right to proceed to trial). The latter claim of error was premised on the "fair notice rule," a prophylactic doctrine originating in the D.C. Circuit, that is intended to ensure *pro se* inmate litigants a meaningful opportunity to oppose a summary judgment motion. *See Arreola v. Mangaong*, 65 F.3d 801, 802 (9th Cir. 1995), *overruled by Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1997); *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988); *Jacobsen v. Filler*, 790 F.2d 1362, 1364 n.4 (9th Cir. 1986); *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968).

On June 3, 1997, a three-judge panel of the Ninth Circuit vacated the orders granting summary judgment against Rand on the basis of the fair notice violation. *Rand v. Rowland*, 113

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4. After the Magistrate's first Findings and Recommendations (ER 389-99), the parties submitted additional briefing (CR 87, 90), and so the District Court ordered the Magistrate to make further recommendations and findings. ER 400.

5. Petitioners correctly assert that Rand did not file objections to the Magistrate's Findings and Recommendations. Petition 3. But that is irrelevant, because Petitioners have never argued in this appeal that Rand's failure to do so somehow compels affirmance of the judgment, nor do they seek review of that question before this Court.

F.3d 1520, 1522-23 (9th Cir. 1997) (following *Arreola*, 65 F.3d at 802 and *Klingele*, 849 F.2d at 411-12). The Panel also rejected Rand's argument that the district court had abused its discretion by refusing to appoint him counsel, and it ruled that Rand's arguments on the merits were not ripe for review in light of its fair notice analysis. *Rand*, 113 F.3d at 1525.

Petitioners then filed a Petition for Rehearing with Suggestion for Rehearing En Banc urging the court to reconsider two aspects of the fair notice rule, but not questioning its validity. The Petition was granted by the Ninth Circuit on September 4, 1997. At the subsequent *en banc* oral argument, the Attorney General agreed that the fair notice rule should remain the law of the Circuit. *See Rand v. Rowland*, 154 F.3d 952, 959 (9th Cir. 1997) (*en banc*).

On August 27, 1998, a divided 11-member en banc panel of the Ninth Circuit vacated the orders granting summary judgment for Petitioners on the basis of the fair notice violation and remanded the case back to the district court. *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1997) (*en banc*). The lead opinion was comprehensive, touching upon virtually every aspect of the doctrine.

The lead opinion first explained the justifications for the fair notice rule: the complexities of summary judgment, its counter-intuitiveness (particularly for individuals having encountered the criminal justice system, which has no summary judgment counterpart), the fact that it is a drastic remedy, as well as the constraints that incarceration places one's ability to obtain legal representation and to prosecute one's case. *Rand*, 154 F.3d at 956-57. It also identified several different sources for the rule: the policy of liberally construing *pro se* pleadings (*id.* at 957), the right to meaningful access to the courts (*id.*), and the language of Rule 56 read in light of the general purpose

of the Federal Rules of Civil Procedure, including Rule 1. *Id.* at 958. It also reasoned that enforcement of the rule was an appropriate exercise of its own inherent supervisory powers over district courts. *Id.* at 959.

Agreeing with one of Petitioners' two challenges to the existing law of the circuit, the court overruled prior precedent insofar as it prevented a moving party from attempting to provide "fair notice" in place of the district court. *Rand*, 154 F.3d at 959 (overruling *Arreola*, 65 F.3d at 802). Instead, as Petitioners had urged, the court declined to "elevate source over substance," and held that notice may come from a moving party. *Rand*, 154 F.3d at 959-60.

The lead opinion then addressed an issue of first impression in the circuit about the contents of proper notice, and went on to hold that the two-page statement given by Petitioners was deficient in several respects. *Id.* at 960-61.[6] Among other defects, it did not convey to Rand what the court viewed as the "most important" piece of information (*Rand*, 154 F.3d at 960) — that the consequences of losing the

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6. The court held that proper notice must be phrased in clear, understandable English; inform an inmate of his right to file counter-affidavits or other admissible evidence; warn the litigant that failure to do so might result in the entry of summary judgment against him; clearly and conspicuously warn that if the motion is granted, the case will be over; warn that failure to controvert the evidence of the moving party with affidavits or other evidence might result in the moving party's evidence being accepted as the truth and final judgment possibly being entered without a trial; and also include a short and plain statement of any requirements imposed by local rules. *Rand*, 154 F.3d at 960-61 (relying on *Timms v. Frank*, 953 F.2d 281, 285 (7th Cir. 1992); *Griffith v. Wainright*, 772 F.2d 822, 825 (11th Cir. 1985); *Moore v. Florida*, 703 F.2d 516, 520-21 (11th Cir. 1983); *Davis v. Zahradnick*, 600 F.2d 458, 460 (4th Cir. 1979)).

summary judgment motion meant that Rand's case would be over, and that there would be no trial. *Id.* at 962.[7]

The Majority carefully laid out the limits of a harmless error inquiry in the context of this type of error. It declined to subjectively parse the opposition papers filed by Rand to try to guess whether Rand understood what was at stake if he failed to put all of his evidence before the court, but it nonetheless enumerated several examples of how an objective examination of the record might disclose that a fair notice violation could be harmless. *See id.* at 961-62. It ruled, however, that the record in this case did not support such a factual finding. *Id.* at 962 n.10.

In addition to the lead opinion, there was a concurrence by one member of the court joining in the lead's analysis. *Rand*, 154 F.3d at 963-64 (Reinhardt, J., concurring). Two other members of the court joined in the lead's analysis of harmless error and the question of allowing a moving party to give notice, and they voted not to abandon the fair notice rule, despite questions about the continued need for it, because they did not view the question as at issue. *Id.* at 964 (Thomas, J., concurring). The five members of the dissent would do away with the fair notice rule altogether, or at a minimum, find that the error in this case was harmless. *Id.* at 964-72 (Kleinfeld, J., dissenting).

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7. Although the Majority found that the notice supplied by Petitioners "did meet our requirement that the *pro se* prisoner be informed of his or her right to file counter-affidavits or other responsive materials," (*Rand*, 154 F.3d at 962), it did not comment on the fact that Petitioners' notice did not advise Rand that if he failed to controvert the motion with opposing counter-affidavits or other evidence, then the moving party's evidence might be taken as the truth (ER 114-16), which was an indispensable component of proper notice. *See Rand*, 154 F.3d at 960-61.

On September 22, 1998, the Ninth Circuit ordered the parties to submit briefs addressing whether the appeal should be reheard, after a member of the court *sua sponte* had called for a vote for full court rehearing. On December 2, 1998, after further briefing by the parties, the Ninth Circuit declined to order full court *en banc* review. The mandate thereafter issued on February 18, 1999. Respondent's Appendix A.

REASONS FOR DENYING THE WRIT

Fair notice requirements for *pro se* prisoners are currently recognized in six circuits. *See Rand*, 154 F.3d at 958 (9th Cir. 1998); *Bryant v. Madigan*, 91 F.3d 994, 996 (7th Cir. 1996) (per curiam); *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir. 1996) (per curiam); *Graham v. Lewinski*, 848 F.2d 342, 344-45 (2d Cir. 1988); *Griffith v. Wainright*, 772 F.2d 822, 825 n.6 (11th Cir. 1985); *Lewis v. Faulkner*, 689 F.2d 100, 101-02 (7th Cir. 1982); *Ham v. Smith*, 653 F.2d 628, 630 (D.C. Cir. 1981); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam); *Hudson*, 412 F.2d at 1094 (D.C. Cir. 1968). Four circuits (the First, Third, Eighth and Tenth) have not addressed the question in any published opinion. *But see Rocha Vigil v. City of Las Cruces*, 119 F.3d 871, 875 n.5 (10th Cir. 1997) (Lucero, J., dissenting) (noting, in appeal by non-prisoner, that district courts should inform non-moving *pro se* litigants of "their evidentiary burden under [Rule] 56[e]" (*citing Timms v. Frank*, 953 F.2d 281, 285 (7th Cir. 1993))).

The Sixth Circuit has declined to recognize fair notice requirements for *pro se* prisoners. *Williams v. Browman*, 981 F.2d 901, 903 (6th Cir. 1992). The Fifth Circuit has held that *pro se* litigants are not entitled to notice of the right to submit opposing affidavits on summary judgment

in a case involving a *pro se* prisoner. *Martin v. Harrison County Jail*, 975 F.2d 192, 193 (5th Cir. 1992).[8]

Despite these inconsistent results, however, the judgment below does not create such irreconcilable splits of authority, nor are the issues of sufficient nationwide importance, to warrant the grant of certiorari on any aspect of the fair notice rule. Moreover, some of the issues are not properly preserved, and the case also does not present an appropriate record to enable review of the issues raised by Petitioners.

I.

PETITIONERS HAVE WAIVED THE RIGHT TO REVIEW ONE OF THE TWO QUESTIONS PRESENTED, MAKING THIS APPEAL AN UNSUITABLE VEHICLE FOR THE COURT'S CONSIDERATION OF THE FAIR NOTICE RULE.

Petitioners have never, until the eleventh hour, questioned the validity or the need for the fair notice rule as applied to pro se inmates. Petition i, 6-8.

After the three-judge panel vacated the orders granting summary judgment because of the fair notice violation, Petitioners filed for rehearing, urging the Ninth Circuit to depart from the existing law of the circuit in just two respects. They

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8. While *Martin* broadly stated, in the context of a claim by a *pro se* prisoner, that "particularized additional notice of the potential consequences of a summary judgment motion and the right to submit opposing affidavits need not be afforded a *pro se* litigant" (975 F.2d at 193), its assertion concerning the need for notice about potential consequences is dicta. That is because the appellant merely sought to reverse an order granting summary judgment on the ground that the District Court did not adequately explain *how* to oppose the motion. *Id.* There was no claim of error predicated on a failure to advise of the potential *consequences* of summary judgment.

argued that a moving party should be entitled to give the required notice, rather than require district courts to do so in all cases (*cf. Arreola v. Mangaong*, 65 F.3d 801 (9th Cir. 1995)), and that Rand was not prejudiced by the fair notice violation, judged by the quality of the opposition papers he had filed in the district court. *Cf. Klingele v. Eikenberry*, 849 F.2d 409, 411 (9th Cir. 1988). But Petitioners did *not* question the need for a fair notice rule, nor did they question the court of appeal's authority to recognize and enforce such a rule.[9] In fact, at oral argument, they expressly urged the Ninth Circuit to retain the fair notice rule. *Rand*, 154 F.3d at 959; *see also id.* at 964 (Thomas, J., concurring) ("both parties endorse it and strongly urge its continuation").

In these circumstances, Petitioners unquestionably have waived the right to secure a determination from this Court of their first Question Presented, or any aspect of it. *See Steagald v. United States*, 451 U.S. 204, 209-10 (1981) (waiver of issue in Supreme Court by making contrary assertions to the courts below, acquiescing in contrary findings by those courts, or failing to raise such questions in a timely fashion). *See also Schiro v. Farley*, 510 U.S. 222, 228 (1994) ("we ordinarily do not review claims made for the first time in this Court."). At the very least, prudential considerations weigh significantly against review of any aspect of that question. *Cf. Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam).

Apparently seeking to avoid this fundamental problem, Petitioners contend that the Ninth Circuit *en banc* panel "*sua sponte* reconsidered, and then reaffirmed, the propriety of Rule

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9. The first time that Petitioners urged these questions was in their brief in support of full court rehearing, which was filed *after* the Ninth Circuit's *en banc* decision, and *after* the time to file a suggestion for rehearing *en banc* before the full court had expired.

56 requirements." Petition 4.[10] Although this Court ordinarily may review issues not raised by either party below if the issues nonetheless are passed on by the lower court (*see, e.g., Stevens v. Dep't of the Treasury*, 500 U.S. 1, 8 (1991)), a different result should obtain here because Petitioners' endorsement of the fair notice rule in the Ninth Circuit carried obvious influence with the Majority. *See Rand*, 154 F.3d at 959; *id.* at 964 (Thomas, J., concurring). And now they have completely reversed their position. *Cf. United States v. Williams*, 504 U.S. 36, 43 (1992). *See also, e.g., Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp., Inc.*, 522 U.S. 192, 118 S. Ct. 542, 567-68 (1997) (petitioner waives claim that is contrary to position urged earlier in petition for writ of certiorari); *Steagald*, 451 U.S. at 209-10.

In short, Petitioners' shifting litigation positions should not be condoned by a grant of certiorari. Should this Court deem the fair notice rule of sufficient importance to warrant review, it should await an appeal in which all of the issues are properly preserved — not just the harmless error question.

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10. Ironically, even that statement contradicts Petitioners' earlier position in the Ninth Circuit. There, they argued that, "[b]ecause it had not been urged by Defendants in their Petition or at oral argument, the [limited en banc] Court did not reconsider the validity and application of *Klingele* itself." Defendants-Appellees Amended Brief in Support of Full Court En Banc Hearing 5.

II.

THE JUDGMENT BELOW DOES NOT CREATE AN IRRECONCILABLE CONFLICT WITH EITHER THE FIFTH OR SIXTH CIRCUIT CONCERNING THE VALIDITY OF THE FAIR NOTICE RULE.

Although the Sixth Circuit has declined to recognize fair notice requirements for *pro se* prisoners, it did not consider the text of Rule 56 itself, nor Rule 1 of the Federal Rules of Civil Procedure, nor any of the other sources for the rule identified by the Plurality in this case. *Williams*, 981 F.2d at 903. It merely observed that there is no circuit authority for such a rule. *Id.*

Similarly, in holding that *pro se* litigants are not entitled to notice of the right to submit opposing affidavits on summary judgment, the Fifth Circuit in *Martin* did not consider any of the unique handicaps of incarceration that compel recognition of such a rule for prisoners. *Compare Martin*, 975 F.2d at 193 *with Rand*, 154 F.3d at 956-57; *Hudson*, 412 F.2d at 1094. Rather, the court broadly stated that such notice "need not be afforded a *pro se* litigant," concluding that "[t]he notice afforded by the Rules of Civil Procedure and the local rules are, in our view, sufficient." *Martin*, 975 F.2d at 193. For support, *Martin* merely relied on two decisions that declined to recognize fair notice protections for non-prisoners. *See* 975 F.2d at 193 n.1 (citing *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1987); *Jacobsen v. Filler*, 790 F.2d 1362, 1364-67 (9th Cir. 1986)). Because *Martin* established a rule for all *pro se* litigants, without particular consideration of the inmate's special circumstances, it is not in direct conflict with the judgment below.

In any event, *Martin* pre-dates Congress's recent enactment of the Prison Litigation Reform Act of 1995, Pub.

L. 104-134, 110 Stat. 1321-66 (1996), which was intended to curb litigation by inmates by, *inter alia*, making it more difficult for them to obtain legal representation and to secure access to the courts. *See* 42 U.S.C. §1997e(d) (restrictions on attorney's fees); *id.* §1997e(c) (early screening procedures). Before this Court weighs in on whether there is a need for any aspect of the fair notice rule, the courts of appeal should have more time to assess the impact of the PLRA on prisoner lawsuits, and its corresponding significance for the fair notice rule. To date, only the Ninth Circuit has done so. *Compare Rand*, 154 F.3d at 959 n.6 *with id.* at 967 (Kleinfeld, J., dissenting).

III.

THERE IS NO CIRCUIT SPLIT ON THE JUDICIAL AUTHORITY ISSUE RAISED BY PETITIONERS.

Petitioners contend that this appeal calls into question "the power of the Ninth Circuit to promulgate a rule of its own making." Petition 8. But this Court should await further guidance from other circuits before weighing in on the various sources of authority for the fair notice rule identified by the Plurality, because the other circuits have scarcely considered that question in all of its dimensions, much less ended in conflict. Thus, there currently is no need, nor any basis, to "clarify" the Ninth Circuit's authority to reach the result that it did in this case. *Id.*

No circuit has held that the courts of appeal lack the authority to recognize and enforce a fair notice rule. The Sixth Circuit's rejection of a fair notice rule for *pro se* prisoners was simply based on the absence of any circuit authority for such a rule, and not any consideration of the scope of judicial authority. *See Williams*, 981 F.2d at 903. Similarly, the Fifth Circuit declined to adopt a component of the fair notice rule, *not* because of any perceived lack of authority to do so, but

because of the perceived lack of any need for such a rule and because of practical concerns. *See Martin*, 975 F.2d at 193.

Petitioners attack the judgment below on the ground that the fair notice rule, as enforced by the courts of appeal, somehow encroaches upon the rule-making powers of this Court under 28 U.S.C. § 2072(a). Petition 8. However, no circuit but the Ninth has yet considered that question. *Compare Rand*, 154 F.3d at 958 *with id.* at 965-66 (Kleinfeld, J., dissenting). This Court should not now reach out to decide that question without first giving other lower courts an opportunity to consider it.

The Plurality's view that the fair notice rule derives from the text of Rule 56 also is consistent with the law of the only other circuit that has expressly considered that question. *See Rand*, 154 F.3d at 958-59; *accord*, *Lewis v. Faulkner*, 689 F.2d 100, 101 (7th Cir. 1982). *See also Griffith v. Wainright*, 772 F.2d 822, 824-25 (11th Cir. 1985) (Rule 56 requires "express notice, ten days in advance, of his rights under that rule and how he might best defend them" (footnote omitted)). There simply is no conflict on that question. And no circuit but the Ninth has considered the fair notice rule in light of the mandate of Rule 1 of the Federal Rules of Procedure. *See Rand*, 154 F.3d at 958-59; FED. R. CIV. P. 1 (purpose of the Federal Rules is "to secure the *just*, speedy, and inexpensive determination of every action" (emphasis added)).

The view that the fair notice rule is an appropriate exercise of a court of appeal's inherent supervisory powers over district courts is not in conflict with any other circuit, because none of the others have addressed that question. *See Rand*, 154 F.3d at 959.

The same is true of its conclusion that the fair notice rule effectuates a litigant's right to meaningful access to the courts,

which is a right secured by due process. *See id.* at 957 (citing *Bounds v. Smith*, 430 U.S. 817, 823 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *Hatfield v. Bailleaux*, 290 F.2d 632, 636 (9th Cir. 1961) That is consistent with this Court's teaching that a lack of adequate notice of issues to be considered implicates a fundamental right of due process. *See Lankford v. Idaho*, 500 U.S. 110, 126 (1991). To date, only one other circuit has alluded to the due process justification for the fair notice rule. *Lewis*, 689 F.2d at 101 ("We think [fair notice] is therefore a fair inference from the rules themselves, irrespective of any implications of the due process clause of the Fifth or Fourteenth Amendments"). And none have held that the fair notice rule is *not* commanded by due process concerns.

The Ninth Circuit's comprehensive and multi-faceted analysis of the source of the fair notice rule provides a starting point, not an ending point, for a dialogue between the circuits. It simply would be premature for this Court to step into that discussion before it has even begun. Thus, certiorari should not now be granted on this question.

IV.

ANY INCONSISTENCY BETWEEN THE RULE OF PRESUMPTIVE PREJUDICE ANNOUNCED IN THIS CASE AND SOME DECISIONS OF THE SEVENTH CIRCUIT SHOULD BE TOLERATED.

Petitioners contend that the harmless error analysis of the decision below creates a conflict with the Seventh Circuit. Petition 6. But the Ninth Circuit did not adopt a rule of automatic reversal in this case (Petition i, 6), nor did it repudiate the concept of harmless error. It merely charted the limitations of how to reliably assess harmless error for a question involving subjective determinations, on a record that contains possible

factual gaps. As shown below, the framework that it devised is eminently reasonable, and it is consistent with the decisions of a number of Seventh Circuit panels. Any disparity with the results in other Seventh Circuit decisions simply does not warrant consideration by this Court.

Although the Majority stated broadly that "harmless error review is inappropriate in most cases" of a fair notice violation (*Rand*, 154 F.3d at 961), the only thing the Majority declined to do, and all that Petitioners would have this Court do, was to review Rand's opposition papers in order to make guesses about whether he subjectively understood the risks of not responding in full to the summary judgment motion. *See id.* at 961-62 ("an impossible task"). Only in that limited sense did the court rule that a fair notice violation is one in which "the harmfulness of the error could not be fully assessed on the record," such that prejudice should be presumed. *See id.* at 961. That is all.[11]

The Majority did not foreclose all inquiry into harmless error. It correctly held that if the record (or such information as might be judicially noticed) actually disclosed that a fair notice violation was harmless, based on objective facts, then no reversal would be warranted. *Id.* at 961. One example would

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11. Petitioners also invoke an "actual injury" standard, but that erroneously conflates appellate standards of review with the standing requirements for asserting a constitutional violation. (Petition 9 (citing *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 2180 (1996); *Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994))). Standing rules obviously have nothing to do with the authority of a court of appeal to decide that a certain type of error is, in any part, impervious to scrutiny under traditional "harmless error" principles. Recognizing that a prisoner's right of access to the courts is one basis for the fair notice rule (*Rand*, 154 F.3d at 957), Rand of course has standing to assert a fair notice violation because he suffered actual injury when the court entered summary judgment against him.

be if a plaintiff's opposition papers cited to the Ninth Circuit's decision in this case. *See id.* at 961-62.

Similarly, the Majority noted that if the record discloses that a *pro se* prisoner cannot prove any set of facts that would entitle him or her to relief, then there would be no reversal. *See id.* at 962 n.9 (noting that, under such circumstances, "the lack of notice cannot be harmful."). This, an implicit ruling that Rand's allegations withstand scrutiny under 12(b)(6) standards, also belies Petitioners' suggestion that the Majority somehow ignored the merits of the case. Petition 11. It also is consistent with numerous Seventh Circuit decisions. *See Ross v. Franzen*, 777 F.2d 1216, 1219 (7th Cir. 1985) ("It is not reversible error to fail to give such notice in the limited circumstances where it appears 'beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " (citation omitted)); *Kelley v. McGinnis*, 899 F.2d 612, 615-17 (7th Cir. 1990) (following *Ross* and examining allegations of inmate's complaint); *see also Sellers v. Henman*, 41 F.3d 1100, 1102-03 (7th Cir. 1994) (prejudice analysis based on allegations of plaintiff's complaint); *Madyun v. Thompson*, 657 F.2d 868, 877 (7th Cir. 1981) (same).

Applying that standard, the Majority found that the record did not show that Rand had been given proper notice, nor that he had been "otherwise made aware of the requirements of Rule 56 of which defendants' notice did not inform him"—namely, the fact that if the motion were granted, Rand would have no trial and his case would be over. *Rand*, 154 F.3d at 962 n.10. Thus, the court presumed that the notice violation was prejudicial, and reversed the judgment.

The approach taken by the Majority can hardly be said to "elevate form over substance." Petition 10. It is a workable standard that allows for affirmance if reversal would be a meaningless gesture. But it also spares judges the task of

making imperfect judgments about the subjective understanding of litigants on a record that necessarily has possible gaps because of the underlying notice violation. In essence, the Majority simply decided that one particular method of ascertaining harmless error is unreliable, given the unique character of the error.

Candidly, two Seventh Circuit panels have implied a somewhat more exacting standard. *See Kincaid v. Vail*, 969 F.2d 594, 599 (7th Cir. 1992) ("[t]he plaintiffs have not suggested that, if properly notified of the need to submit affidavits, they would have included any [other] information" in opposition); *Timms v. Frank*, 953 F.2d 281, 286 (7th Cir. 1992) ("if [plaintiff] could not have avoided summary judgment if she had received adequate notice, there would be no point in remanding"); *but see Lewis*, 689 F.2d at 103 (reversing for fair notice violation without engaging in harmless error analysis). But to the extent there are inconsistent results between decisions of the Seventh Circuit, they simply are not the product of lively and/or ongoing debate within that circuit, so much as the consequence of happenstance. This simply is not a live issue, and these disparities are more appropriately addressed within that Circuit. Certiorari should not be used to resolve intra-circuit differences. *See Winiewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties"). *See also Davis v. United States*, 417 U.S. 333, 340 (1974).

Whatever the inconsistent results within the Seventh Circuit, the courts of appeal should be left to devise their own methods for making determinations about what constitutes harmless error. There simply is no overriding need for national uniformity concerning the manner in which they go about doing so. And calling upon this Court to address the question is to ask this Court to resolve what is essentially a factual question.

In the final analysis, too, any inconsistencies should be tolerated at least for now. That is because consideration of whether district court proceedings are infected by *reversible* error presupposes the existence of district court *error*. Yet it is premature to consider the fundamental threshold question of the validity of a fair notice rule for all of the reasons addressed above (Sections I-III, *supra*), and so it would be premature for this Court to decide the question of harmless error.

V.

BECAUSE THE DISTRICT COURT RECORD CONTAINS EVIDENCE OF ACTUAL HARM, THIS APPEAL IS AN UNSUITABLE VEHICLE TO REVIEW A RULE OF PRESUMPTIVE PREJUDICE.

Even if this Court were otherwise inclined to review the standard of presumptive prejudice announced in this case, Petitioners' assertion that "the record does not reflect any actual harm," is incorrect. Petition 9.

In an unverified pleading that Rand filed almost six months after his opposition to Petitioners' summary judgment motion (but while the motion was still pending), Rand volunteered the following additional unsworn facts bearing on his claim that Petitioners had deprived him of exercise in violation of his Eighth Amendment rights, which neither the Magistrate Judge nor the district court ever passed on:

> "The Defendants claim that there were no common areas of the infirmary where inmates could congregate and/or exercise.[12] This simply is untrue.

12. This is an allusion to portions of the affidavit of a prison nurse, Nurse S. Kimbriel, that Petitioners filed in support of their summary judgment motion. Nurse Kimbriel swore that one of the reasons that the prisoners who were housed in the infirmary were not allowed out-of-cell exercise, (Cont'd)

> The physical layout of the infirmary was such that the inmates could have been permitted outside of their cells in the area directly outside their cells. This area was about 10' by 120' and would have been sufficient to permit exercise periods. The doors leading to the nurses station and the outside door were able to be secured. Furthermore, the inmates could have been permitted outside one at a time in order to relieve security concerns."

CR 90 at 14 (Plaintiff's Opposition to Defendants' Objections To Magistrate's Findings and Recommendations dated September 14, 1993). None of these facts were ever presented to the district court by way of competent evidence. Had they been, a different result might have been obtained because they would create a dispute of material fact concerning the availability of alternative exercise areas.[13]

In that same unverified filing submitted six months after his summary judgment opposition, Rand also provided unsworn anecdotal evidence of bias on the part of the prison

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(Cont'd)

> "was because there were no common areas in the infirmary for inmates to congregate and exercise. However, even if there were, because of the mixed custody levels of inmates housed in the infirmary, security issues would frequently arise and make such a plan impractical because there was only one correctional officer assigned in the infirmary."

ER 138.

13. Summary judgment was entered on Rand's exercise claim because "Plaintiff was allowed to exercise in his cell, . . . the period plaintiff was not allowed outdoor exercise was not excessive in length, and defendants present *other and sufficient reasons* for their decision to disallow outdoor exercise." ER 422 (emphasis added).

doctor whose declaration had been the centerpiece of Petitioners' attack on Rand's medical claims. CR 90 at 11 (describing "shady situation" involving Declarant Dr. J. Diamond resulting in Rand's job loss as prison clerk). Neither the Magistrate Judge nor the district court considered those assertions. Had Rand presented them by way of sworn affidavit, they could have prevented summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("[c]redibility determinations . . . are jury functions, not those of a judge [when] he is ruling on a motion for summary judgment. . . ."). As it was, however, Rand never filed a declaration on his own behalf.

Rand also filed a pre-trial statement disclosing the name of an expert trial witness and also suggesting that the court limit each side to the presentation of just two expert witnesses at trial — three weeks after he had filed his summary judgment opposition. ER 378, 383. And months before Petitioners filed their summary judgment motion, Rand alluded to expert witnesses in his deposition testimony about the necessity of certain diagnostic tests (t-cell tests). ER 269 ("I can get experts, march them in to testify to the effect — and your own experts will say so."). All of this suggests that Rand was aware that resolution of his claims, or at least some of them, would necessitate expert evidence. Yet he presented none in opposition to Petitioners' summary judgment motion. Had he known that his right to proceed to trial depended on the thoroughness with which he marshaled his opposition evidence, he perhaps might have been more vigilant to secure that type of evidence in opposition.

As shown above, the district court record contains evidence suggesting that Rand did not understand the need to secure and to present all material evidence bearing on his claims, on pain of losing his right to proceed to trial. Therefore, the facts of this case would not allow this Court to reach the

question of whether, in the absence of such evidence, a court of appeal may presume prejudice from a fair notice violation.

VI.

PETITIONERS OVERSTATE THE INTERESTS AT STAKE IN THIS CASE.

A. The Judgment Does Not Implicate Any Interest In Curtailing Non-Meritorious Prisoner Litigation.

Petitioners envision that the federal district courts will experience a logjam of non-meritorious lawsuits unless either the fair notice rule is abandoned, or the courts of appeal employ a more rigorous standard of review of fair notice error. *See* Petition 1, 10, 11. These fears are unfounded.

There has never been a finding by the Magistrate Judge nor by the district court that Rand's claims were frivolous, nor that they failed to state a claim upon which relief could be granted. To the contrary, very early on the Magistrate Judge expressly found that the action was *not* frivolous, and he advised Rand that he would later dismiss the action should it later appear that his claims were frivolous. ER 73. But he never did so. This also is a case in which summary judgment was nearly averted.[14] And, on appeal, the Majority opinion also presupposes that it would not be impossible for Rand to prove any set of facts that would entitle him relief. *See Rand*, 154

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14. The initial recommendation of the Magistrate Judge was to *deny* Petitioners' summary judgment motion in its entirety, other than as to one defendant. ER 389-99. The District Court agreed, but denied the motion "without prejudice" other than as to that one defendant, with orders that the Magistrate reconsider the rest of the motion in light of the brief that Petitioners had filed challenging the initial findings (CR 87) and Rand's response (CR 90). ER 400-03. It was only after that summary judgment was granted as to the remaining defendants and the case dismissed in its entirety. ER 428-31.

F.3d at 962 n.9. (To that extent, the decision contains an implied inquiry into the merits, which is a check against any concern that district court dockets might needlessly be burdened by baseless lawsuits.)

Beyond the facts of this case, one also should assume that the early screening procedures of the PLRA will weed out non-meritorious lawsuits long before they get to the summary judgment stage. *See Rand*, 154 F.3d at 959 n.6; 42 U.S.C. § 1997e(c).

Even if the curtailment of non-meritorious prisoner litigation is an interest that might otherwise justify a grant of certiorari, it has nothing to do with the judgment in this case.

B. The Issues Presented by This Case Have Nothing To Do With The Rights Of Non-Incarcerated Pro Se Litigants.

Petitioners suggest there is a circuit conflict as to whether the fair notice rule also applies to non-prisoner litigants. Petition 5-6. *See Jacobsen v. Filler*, 790 F.2d 1362, 1364 & n.4 (9th Cir. 1986) (declining to apply fair notice rule). The Petition even purports to seek review of the circumstances, if any, in which fair notice should be provided to *all pro se* litigants, "prisoner and non-prisoner alike." Petition 11. But this appeal only concerns a *pro se* litigant who was faced with a summary judgment motion while he was incarcerated. The question of whether or not district courts should give *all pro se* litigants notice of the rules and consequence of summary judgment has never been an issue. Thus, it would exceed this Court's Article III jurisdiction to decide the question so broadly posed by Petitioners. *See* U.S. CONST. art. III, § 2 (requiring actual case or controversy).[15]

15. In any event, regardless of whether or not there is any "empirical evidence" of whether "prisoners are categorically less able (Cont'd)

The question of the rights of non-incarcerated litigants is not contemplated by this appeal, under any conceivable analysis.

VII.

ALL OF THE ISSUES ARE MOOT.

Because the mandate has already issued (Respondent's Appendix A), the question of whether Rand is entitled to a remand on the basis of a fair notice violation is moot.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: May 3, 1999

Respectfully,

AMY E. MARGOLIN
Counsel of Record
HOWARD, RICE, NEMEROVSKI,
CANADY, FALK & RABKIN
A Professional Corporation
Attorneys for Respondent
Three Embarcadero Center
7th Floor
San Francisco, California 94111-4065
(415) 434-1600

(Cont'd)
to obtain representation by counsel in meritorious cases or less able to communicate with the court than other *pro se* litigants" (*see* Petition 7), the history of this case bears out that these hurdles are real ones for individuals litigating from behind prison walls. Not only were Rand's two requests for appointed counsel denied (ER 19, 69, 75), but he also missed a filing deadline because he had been transferred to segregated housing, where he was given extremely limited law library access — just one-and-a-half to two hours every week. CR 95.

APPENDIX

RESPONDENT'S APPENDIX A — LETTER FROM THE DEPUTY CLERK OF THE NINTH CIRCUIT DATED FEBRUARY 18, 1999 TRANSMITTING A CERTIFIED COPY OF THE DECREE OF THE COURT TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA (SACRAMENTO)

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street, P. O. Box 193939
San Francisco, CA 94119-3939

February 18, 1999

USDC, Sacramento
Eastern District of California (Sacramento)
Room 4-200
501 "I" Street
Sacramento, CA 95814

CA. NO.	TITLE	AGENCY/D.C. NO.
95-15428	Rand v. Rowland	CV-91-00680-DFL

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being served to you under cover of this letter. Counsel are being served with a copy of this letter only.

[X] Certified copy of the Decree of the Court

* * *

The record on appeal will follow under separate cover.

Appendix A

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: s/ Howard Hom
Howard Hom
Deputy Clerk

Enclosure(s)
cc: ALL COUNSEL, WITHOUT ENCLOSURES